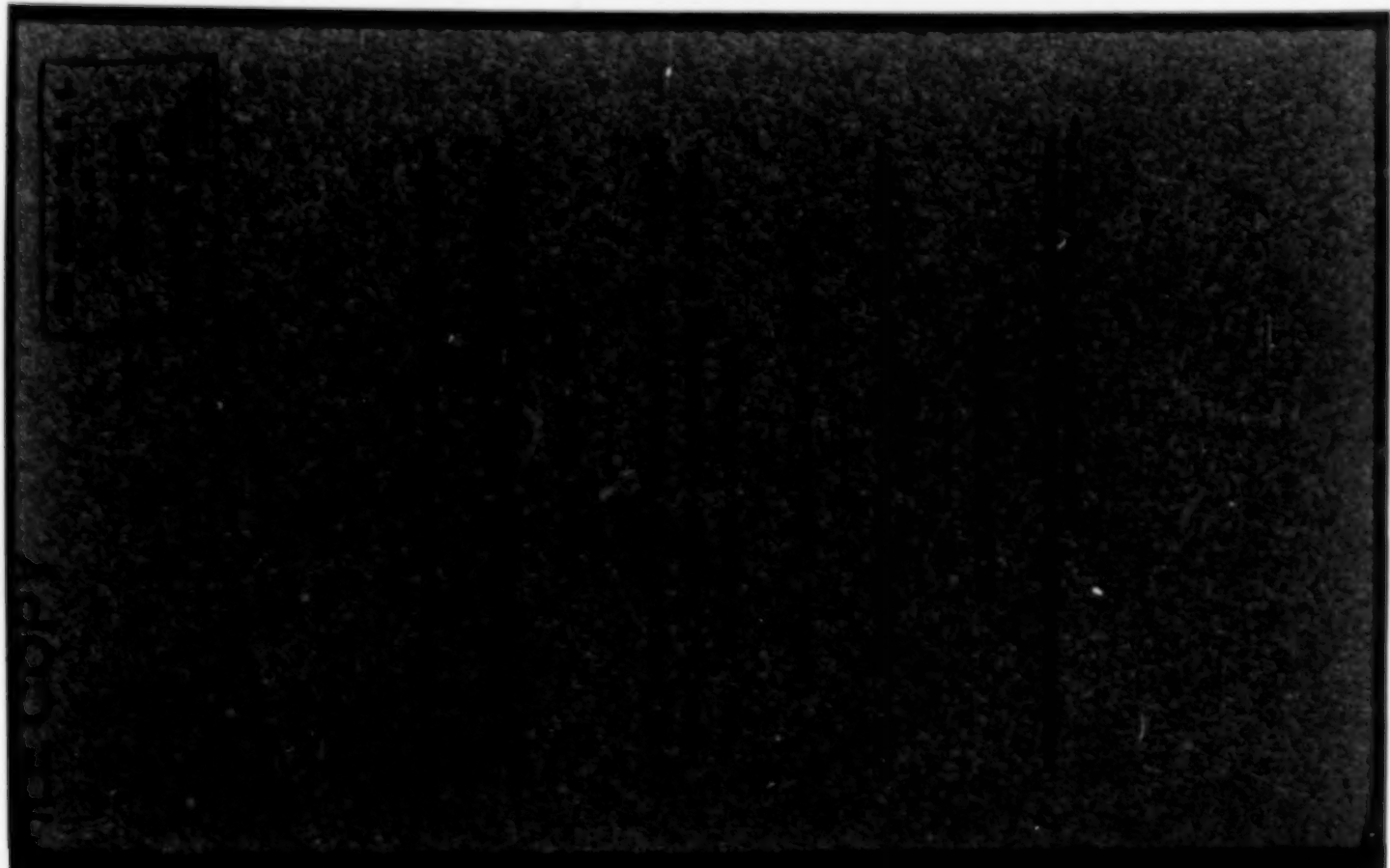

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The Central Pacific Railway Company is the successor of the California and Oregon Railroad Company, one of the beneficiaries under the Act of Congress of July 25, 1866, ch. 242, 14 Stat. 239, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the Central Pacific Railroad, in California, to Portland, in Oregon." This Act is in general similar to numerous other Acts of Congress to aid in the construction of railroads. Section 2 granted the odd-numbered sections not mineral to the amount of twenty alternate sections per mile along the line of the railroad, and provided that where such sections were found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, other lands should be selected in lieu thereof, *under* the *direction* of the Secretary of the Interior.

The Railway Company, on February 24, 1910, filed in the local land office at Redding, California, an indemnity selection list for the lands here involved in lieu of lands lost to it in the place limits of the grant. R. 6. Subsequently, but before the list had been passed upon by the Commissioner of the General Land Office or approved by the Secretary of the Interior, the lands in controversy were withdrawn and placed in a power site reserve (Power Site Reserve No. 232) under the authority of the Act of June 25, 1910, ch. 421, 36 Stat. 847 (U. S. Comp. Stats. 1916, Ann. §§4523, 4524, 4525).

In view of that withdrawal, the Commissioner of the General Land Office held said list as to these

lands for rejection and cancellation. Upon appeal, the Secretary of the Interior affirmed that action and adhered to his decision upon motion for a rehearing, whereupon this suit was brought.

The theory of the bill (R. 1–11) seems to be that while the selection of indemnity lands is under the granting Act subject to supervision and approval by the Secretary of the Interior, yet that officer is limited in his supervision to a determination of the right of the Company in the lands selected as of the date of the filing thereof and that conditions at that time are controlling. Further, that subsequent disposition of the lands applied for is not authorized, is in violation of the Company's rights and deprives it of the benefits conferred by the granting Act, and is barred by the construction of the railroad.

As a return to the rule to show cause, a motion to dismiss was filed (R. 15, 16), setting up that the bill did not exhibit a cause for equitable relief; that the withdrawal of the land was made by the President pursuant to an Act of Congress; that an indemnity selection was not one of the classes of claims excepted by said Act from its force and effect; that no rights under such a selection vest until approval by the Secretary of the Interior and that he is now without power to approve in view of the power site withdrawal; that the relief sought would be an interference with the discretionary functions of the Secretary in a matter coming within his jurisdiction;

and finally that title to the lands is still in the United States which therefore is a necessary party and which has not consented to be sued.

The motion was sustained and a decree entered dismissing the bill. R. 17.

Upon appeal, the Court of Appeals reversed the decree and remanded the cause to the Supreme Court with instructions to enter a decree restraining the defendants from rejecting the selection list and directing the approval of the list for patent. R. 32. Opinion of the Supreme Court, R. 16, 17; Opinion of the Court of Appeals, R. 21–32; 46 App. D. C. 374, 382.

The appeal of the defendants brings the cause to this court.

ASSIGNMENT OF ERRORS.

The assignment of errors (R. 34, 35) is as follows:

1. That the court erred in reversing the decree of the Supreme Court of the District of Columbia in favor of the appellees and against the appellant and in remanding the cause for a decree restraining the appellees from rejecting and cancelling appellant's selection list and ordering the vacation of the order withdrawing the land in suit as a water-power site and the approval of appellant's selection of said land.

2. That the court erred in not affirming the decree of the Supreme Court of the District of Columbia herein issued.

3. That the court erred in holding that appellant railroad acquired a vested property right in or title

to the land in controversy, as against the United States, by the act of filing its selection list embracing said land.

4. That the court erred in not holding that no property rights in indemnity lands accrue to and vest in a railroad, under its grant, as against the United States, unless and until a selection list duly filed is approved by the Secretary of the Interior.

5. That the court erred in failing to hold that at the time when the railroad's selection list was presented to the Secretary of the Interior for approval or disapproval, the President of the United States having withdrawn the land in controversy under the authority of the act of June 25, 1910, the Secretary of the Interior was without power or authority to approve said selection list.

6. That the court erred in failing to find and to hold that Congress in the said act of June 25, 1910, expressly enumerated the particular classes of claims excepted from the operation of a withdrawal made by the President under the terms of said act and that a railroad indemnity selection is not among the enumerated classes.

7. That the court erred in failing to recognize and to hold that any withdrawal of land made by the President under the terms of said act of June 25, 1910, remains, by the express terms of the act, in force until revoked by the President or by an act of Congress.

8. That the court erred in remanding the cause with instruction to enter a decree to compel the

Secretary of the Interior to vacate the order withdrawing the land in suit for power-site purposes when as a matter of fact and law, as by the record is disclosed, the withdrawal was the act of the President of the United States and not that of the Secretary of the Interior.

9. That the court erred in ruling that the Executive order made by the President of the United States withdrawing the land in controversy for power-site purposes, under the authority of said act of June 25, 1910, since the said order was made after the filing of the railroad's selection list, was made without lawful authority, is a mere nullity, and entitled to no consideration as against rights held to be already vested in said railroad.

10. That the court erred in holding that the United States is not a necessary party to this suit.

11. That the court erred in directing the Secretary of the Interior to approve the railroad's selection list, an act undeniably operating to pass title to the said railroad, in a suit to which the United States is not a party.

In support of this assignment we submit the following propositions:

1. Until approval by the Secretary of the Interior no rights as against the United States are acquired under an indemnity selection list.

2. The withdrawal of the lands in controversy and their inclusion in a power site reserve, was authorized and valid and constituted a bar to the approval of the selection list.

3. The decree of the Court of Appeals directing an order for the issuance of patent was erroneous, since the United States was not a party and the effect of that decree would be to deprive the United States of the title to its lands.

ARGUMENT.

I.

Until approval by the Secretary of the Interior no rights as against the United States are acquired under an indemnity selection list.

The status of indemnity selections has often been considered by this court and the rule laid down and many times reiterated is, that no title, legal or equitable, to indemnity lands is vested until an application to make selection is filed *and* that application is approved by the Secretary of the Interior. *Sioux City & St. P. R. R. Co.* v. *C. M. & St. P. Ry. Co.*, 117 U. S. 406, 408; *Wisconsin Central R. R. Co.* v. *Price County*, 133 U. S. 496, 511, 512, 513; *United States* v. *Missouri, Kansas & Texas Ry. Co.*, 141 U. S. 358, 374, 375; *New Orleans Pacific Ry. Co.* v. *Parker*, 143 U. S. 42, 57, 58; *Osborn* v. *Froyseth*, 216 U. S. 571, 577; *Northern Pacific Ry. Co.* v. *McComas*, 250 U. S. 387, 391, 392.

In *Humbird* v. *Avery*, 195 U. S. 480, 507, it was said "this principle is firmly established."

The function of the Secretary in this regard is judicial. *Osborn* v. *Froyseth*, *supra*.

The principle is thus stated in *Wisconsin Central R. R. Co.* v. *Price County, supra,* at pp. 511, 512:

> The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions he had also to inquire and determine whether any lands in the place limits had been previously disposed of by the government, or whether any preemption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and if so, what portion had been thus appropriated, and what portion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of

> their lands. Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The Government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts.

It is necessary to bear in mind that there is a clear distinction between the filing of an application to select and an approved selection. The word "selection" is often commonly used to refer to an application to select and from that arises a misapprehension as to what is meant in many of the adjudicated cases by the expression that title under such a filing vests upon selection. In such cases the word "selection" means approved selection. As was said in *Wisconsin R. R. Co.* v. *Price County, supra* (p. 514): "They [selections] are not considered as made *until they have been approved, as provided by statute, by the Secretary of the Interior.*" [Italics ours.]

What is the effect then of the mere *filing* of an indemnity selection? Its only effect, we submit, is to give the selector a preference right to the land as against one tendering a filing thereafter, unless such latter filing is supported by a settlement or right

initiated previously to the indemnity filing. *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, 387, 388, 391, 392. In other words, the one who is first in time is first in right.

But it is important to note that this principle pertains to the relative rights of individuals seeking to acquire title from the Government but it can not be invoked against the Government itself. This distinction differentiates the instant case from *Weyerhaeuser* v. *Hoyt*, *supra*, and what is said in the opinion in that case as to the doctrine of relation and the scope of the inquiry of the Secretary of the Interior in passing upon the selection must be taken in connection with the question there under consideration, namely, the relative rights of conflicting claimants. It is also important to note that in the *Weyerhaeuser* case the selection had been approved and therefore the doctrine of relation was clearly applicable.

The doctrine of relation involves a legal fiction by which an act performed on a given date is deemed to have been performed at an earlier date. Of course if the act is never performed the fiction can not be indulged. *United States* v. *Detroit Lbr. Co.*, 200 U. S. 321, 334. The failure of the Court of Appeals to bear this in mind caused it to fall into error in its decision, for the opinion shows that it relied as to this point almost entirely upon the authority of *Weyerhaeuser* v. *Hoyt*. In the case at bar there has been no approval of the selection and therefore there

is nothing upon which to base an application of the doctrine of relation.

That the filing of an indemnity selection does not create rights as against the United States is also shown by what is said in the opinion of this court in the case of *Stalker* v. *Oregon Short Line R. R. Co.*, 225 U. S. 142. The question there was as to the relative rights of a preemption entryman and the railroad company which claimed under the so-called right-of-way Act of March 3, 1875, ch. 152, 18 Stat. 482. The company had submitted for approval by the Secretary of the Interior a map showing the station grounds to which it claimed itself entitled under section 4 of said act. After the map had been submitted and before it had been approved, the filing of the preemptor was made. It was held that the company's rights were superior, but the court in its opinion, used this language, which is particularly significant in the matter which we are now discussing (p. 149):

> The principle is that which has been many times applied in conflicting claims to indemnity lands under railroad land grants. In such cases the patent, when issued, is held to relate to the date of the filing of the railroad company's list of selections in lieu of place lands lost, thereby defeating adverse rights initiated after the actual filing of the list of selections. The same rule has likewise been applied to lists of selections made by States to which a grant has been made subject to location. In both classes of cases, it has been many times ruled

> *that while no vested right against the United States is acquired until the actual approval of the list of selections,* the company does acquire a right to be preferred over such an intervener. In other words, the patent, when issued, relates back to the initiatory right, and cuts off all claimants whose rights were initiated later. The question was fully reasoned out and the cases reviewed in *Weyerhaeuser* v. *Hoyt*, 219 U. S. 380, and we can add nothing to the conclusiveness of that case. [Italics ours.]

After referring to and discussing the decision in *Minneapolis, St. Paul &c. Ry. Co.* v. *Doughty*, 208 U. S. 251, this court further said (p. 151):

> What is said in the opinion about the grant of a right of way being dependent upon the doing of three things—location of road, filing profile of it in the Land Office, and the approval thereof by the Secretary of the Interior—and that "*thereafter* all such lands over which such right of way shall pass shall be disposed of subject to such right of way," refers to the nonvesting of any right *as against the United States*, and not as denying the priority of right in the acquisition of the premises as *between parties* growing out of priority of application.

But it is asserted by the railway company that when the Secretary of the Interior passes upon an indemnity selection, his inquiry is limited to the conditions existing at the date of the filing of the selection and he can not consider any change in condition after that date.

The basis for this assertion appears to be that by filing its selection list the company "has done all that was required of it" under the law and hence has acquired vested rights which can not be disturbed.

However, the well-established rule that a claimant to public land, who has done all that is required to perfect his claim, acquires rights against the Government, is based upon the theory that by virtue of his compliance with the requirements he has an *equitable title* to the land; that in equity the land is his and the Government holds it in trust for him. *Wirth* v. *Branson*, 98 U. S. 118, 121; *Cornelius* v. *Kessel*, 128 U. S. 456, 459; *Benson Mining Co.* v. *Alta Mining Co.*, 145 U. S. 428, 432–434.

That rule can have no application to this case for, as we have seen, no *legal* or *equitable* title vested as to the lands sought under the indemnity selection because the same was never approved. It was, therefore, incumbent on the Secretary to ascertain the status of the lands at the time when the indemnity filing was taken up by him for final action. The Court of Appeals, however, erroneously regarded the mere filing of an indemnity selection as vesting an equitable title in the selector, and on that false premise applied the rule laid down as to those who have obtained an equitable title.

II.

The withdrawal of the lands in controversy and their inclusion in a power site reserve was authorized and valid and constituted a bar to the approval of the selection list.

It is definitely settled that the Executive has power without the express authority of Congress to make withdrawals of public lands and to reserve them from appropriation. *United States* v. *Midwest Oil Co.*, 236 U. S. 459.

But in the case at bar we need not rely upon that power for, by the Act of June 25, 1910, ch. 421, 36 Stat. 847, Congress expressly authorized the President to withdraw public lands from settlement, location, sale or entry and to reserve the same for certain purposes, one of which was for water power sites.

Section 1 of that Act (U. S. Comp. Stats. 1916, Ann., §4523), is as follows:

> The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including the District of Alaska and reserve the same for water power sites, irrigation, classification of lands or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress.

The withdrawal of the lands in question was made pursuant to the authority of this Act. We understand that appellee concedes that this power may be

exercised as to vacant, unapplied-for lands, but insists that it can not be invoked as to the lands in controversy since the filing therefor was made prior to the withdrawal.

The foundation for this contention must be that the filing of the list initiated a claim of such a character that rights thereunder were acquired against which the withdrawal could not operate. That takes us back to the point considered under proposition I, and what we said there is a sufficient answer, we think, to this contention. It might not be amiss, however, to mention these additional matters in this connection. Section 2 of the Act of June 25, 1910, as amended by the Act of August 24, 1912, ch. 369, 37 Stat. 497 (U. S. Comp. Stats. 1916, Ann., §4524), particularly enumerates the kind of claims or filings which are exempted from the force and effect of such withdrawals. That section reads:

> That all lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: *Provided*, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution

of said work: *Provided further*, That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: *And provided further*, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made; *And provided further*, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress.

It will be perceived that but five kinds of claims or entries are saved, viz, claims for metalliferous minerals, under the mining laws; oil or gas claims which had not proceeded to discovery but upon which there was at date of withdrawal diligent prosecution of work leading to discovery, thereafter continued to discovery; homestead or desert-land entries, and settlement claims previously initiated.

Now, had Congress intended that other exceptions should be recognized it would have so declared.

That this has been the view and holding of the Land Department is evidenced by its Administrative Ruling in 43 L. D. 293, in which it was declared (syllabus):

> No such right is acquired by a forest lieu, railroad, or State selection prior to approval thereof by the proper officer of the United States, as will except the land from withdrawal by the government under the act of June 25, 1910.

The Secretary said (p. 293):

> This question, therefore, is now presented: Is the Secretary of the Interior free to dispose of these selected lands, in the face of the act of Congress withdrawing them from disposition?
>
> It is my conclusion, after a careful study of the authorities, that no such authority has been given to the Secretary of the Interior. The acts of Congress authorizing exchanges are merely offers on the part of the United States to exchange other lands for lands held by the selector, and the right of the selector does not attach nor equitable title pass upon mere presentation of the requisite papers. There remains the necessity for action upon the offer by the duly authorized officer of the United States. Until that acceptance has been given and the equitable title passed, Congress has full authority to devote the land to a public purpose.

and (p. 294):

> Congress having power to withdraw lands and devote them to a public use, notwithstanding the existence of the inchoate claims mentioned, having authorized the withdrawals and reservations by the act cited, and withdrawals having been made for public purposes, as prescribed in the act, the Secretary of the Interior has no power or authority to approve or accept such selections or exchanges or to relieve them from the force and effect of an existing reservation.

Numerous authorities are cited to support that conclusion. P. 294.

Furthermore, as only an inchoate right was initiated by the filing of the indemnity list, the withdrawal was superior to it and barred its consummation. Such a filing is not like homestead or other claims upon which final proofs have been submitted and the claimant has done all that is required of him under the law, thus vesting him with a title equivalent in equity to that obtained by patent. It bears a closer analogy to a claim based on the preemption law. In *Frisbie* v. *Whitney*, 9 Wall. 187, and *The Yosemite Valley Case*, 15 Wall. 77, the principle was laid down that mere settlement upon lands of the United States with a declared intention to obtain title thereto under the preemption laws does not give a vested interest in the premises so as to deprive Congress of the power to divest it by a grant to another. In *Shepley* v.

Cowan, 91 U. S. 330, it was said, referring to *Frisbie* v. *Whitney* and *The Yosemite Valley Case* (p. 338):

> In those cases the court only decided that a party, by mere settlement upon the public lands, with the intention to obtain a title to the same under the preemption laws, did not thereby acquire such a vested interest in the premises as to deprive Congress of the power to dispose of the property; that, notwithstanding the settlement, Congress could reserve the lands for sale whenever they might be needed for public uses, as for arsenals, fortifications, light-houses, hospitals, custom-houses, court-houses, or other public purposes for which real property is required by the Government; that the settlement, even when accompanied with an improvement of the property, did not confer upon the settler any right in the land as *against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it might deem proper; that the power of regulation and disposition conferred upon the Congress by the Constitution only ceased when all the preliminary acts *prescribed* by law for the acquisition of the title, including the payment of the price of the land, had been performed by the settler. When these prerequisites were complied with, the settler for the first time acquired a vested interest in the premises, of which he could not be subsequently deprived.

In *Russian-American Packing Co.* v. *United States*, 199 U. S. 570, the Packing Company, without authority or license from the United States, took pos-

session of a tract of land on an island off the coast of Alaska and erected buildings, machinery, etc., at a cost of about $45,000. Subsequently, an Act was passed (Act of March 3, 1891, 26 Stat. 1095, 1100) which provided that a corporation such as the Packing Company might purchase not more than 160 acres of land. Under this act, the Company applied for a survey and made a deposit to cover the cost thereof; the survey was made, but before approval by the Commissioner of the General Land Office, the land was withdrawn and reserved for a fish culture station.

It further appears that by a section of the Act of 1891, it was declared that the provisions relating to acquisition of lands should not be construed to warrant the sale of any lands which should be selected for fish culture stations. The court, referring to that section (14), held that without that section no rights were acquired against the Government, and said (pp. 577, 578):

> Even if section 14 had not been enacted, it would not follow that petitioner, by sections 12 and 13, became entitled to a patent of the United States by procuring a survey of such lands. We have had occasion in several cases to hold that, although the occupation and cultivation of public lands with a view to preemption confers a preference over others in the purchase of such lands by the *bona fide* settler, which will enable him to protect his possession against other individuals, it does not confer a vested right as against the United States in the

land so occupied. Such a vested right, under the preemption laws, is only obtained when the purchase money has been paid, and receipt from the proper land officer given to the purchaser. Until this has been done it is competent for Congress to withdraw the land from entry and sale, though this may defeat the inchoate right of the settler. *Frisbie* v. *Whitney*, 9 Wall. 187. When this payment is made, the other prerequisites having been complied with, the settler is then entitled to a certificate of entry from the local Land Office and ultimately to a patent. *The Yosemite Valley Case*, 15 Wall. 77, 87; *Campbell* v. *Wade*, 132 U. S. 34, 38; *Shiver* v. *United States*, 159 U. S. 491.

Surely, if settlement or occupation of lands give no rights valid as against a subsequent disposition or reservation of the lands by Congress or the President, the mere filing of a selection list will not do so. The settler has always been a favorite of the law, and if his inchoate claims are not excepted, on what theory can it be said that the railway company's are?

Again, in the case of *Wagstaff* v. *Collins*, 97 Fed. (CCA) 3, it was said (p. 8):

> It is urged, however, * * * , that the complainants' ancestor had acquired a vested right in the land by virtue of his homestead claim and residence thereon, of which neither he nor his heirs could be deprived by subsequent legislation, and that the complainants are therefore entitled to the land, to the exclusion of the purchasers from the railway

> company, although Congress clearly intended to confirm the purchasers' title. We are not able to assent to this proposition. In the case of *Shiver* v. *U. S.*, 159 U. S. 491, 495, 16 Sup. Ct. 54, the doctrine was fully approved that an entry upon public lands accompanied by residence thereon, in pursuance of such permission as is given by the land laws of the United States, confers no vested interest in the land until the settler has remained in possession for the length of time or done the acts which under the law entitled him to a patent. Such a settlement, it was said, protects the settler from intrusion by others, but confers no rights as against the United States. This court in *Norton* v. *Evans*, 49 U. S. App. 669, 27 C. C. A. 168, and 82 Fed. 804, 807, also applied the same rule, that had long been applied to preemption claimants, to a homestead claimant, holding that an entry by the latter "creates no vested rights as against the United States, and does not interfere with the power of Congress by subsequent legislation to dispose of the land"; citing *Frisbie* v. *Whitney*, 9 Wall. 187; *The Yosemite Valley Case*, 15 Wall. 77; *Buxton* v. *Traver*, 130 U. S. 232, 9 Sup. Ct. 509; *Campbell* v. *Wade*, 132 U. S. 34, 10 Sup. Ct. 9.

In the case of *Campbell* v. *Wade*, 132 U. S. 34, lands in Texas which had been offered for sale, were withdrawn after a claimant had taken initial action to purchase them. It was said (p. 38):

> In the present case, before the act withdrawing the lands from sale, which was

> equivalent to a repeal of the act authorizing the sale, could be held to impair any vested right of the applicant, he must have done everything required by law to secure such right. Until then no contract could arise in any way binding upon the State.

As to the doctrine of relation, it is undoubtedly true that upon the issuance of a patent or the approval of an indemnity list or a lieu selection, the title acquired relates back to the initiatory steps taken to secure the patent or the approval. But that is not the point here, for no approval has been given.

The doctrine of relation was sought to be invoked in the case of *United States* v. *Morrison*, 240 U. S. 192. That case involved a grant to the State of Oregon of "school sections." A survey had been made in the field, that survey had been approved by the Surveyor General of Oregon, had been submitted to the Commissioner of the General Land Office who called for an additional report on a matter of detail and this report had been furnished. Thereafter, but before formal approval of the survey by the Commissioner, which when given was without change or correction of the survey or plat, the land was temporarily withdrawn for forestry purposes.

In holding that the formal approval of the survey was necessary before the rights of the State attached to the land in controversy, this court said (p. 212):

> Again, it is urged that the survey when approved related back to the date of the

> grant or at least to the date of the survey in the field. The former contention is but a restatement in another form of the argument that Congress could not dispose of the land pending the survey which as we have seen is answered by the terms of the grant; and if Congress had this power of disposition, it must mean that the lands could be disposed of under the authority of Congress at any time before the survey became a completed administrative act. *The doctrine of relation cannot be invoked to destroy this authority.* [Italics ours.]

III.

The decree of the Court of Appeals directing an order for the issuance of patent was erroneous, since the United States was not a party and the effect of that decree would be to deprive the United States of the title to its lands.

The decree of the Court of Appeals was that the Supreme Court of the District of Columbia enter a decree restraining the defendants from rejecting and cancelling the Railway Company's selection list and that they approve the selection list for patent.

Inasmuch as the legal title to the lands in dispute was in the United States, and as the latter was not a party to the suit and had not consented to be sued, that order was erroneous.

The suit was in effect one against the United States, as the result of compliance with the order which the Supreme Court was directed to enter would be to divest the Government of title to its lands. That

was a matter upon which the United States would have to be heard. The case therefore falls within the rulings of this court in *Louisiana* v. *Garfield*, 211 U. S. 70, and *New Mexico* v. *Lane*, 243 U. S. 52.

In the latter case, an original suit in this court, the bill sought an injunction against the Secretary of the Interior restraining him from issuing a patent to one Keepers, for certain lands which he had applied to purchase under the coal land laws, and to which the Secretary of the Interior had adjudged him entitled as against the State which claimed the land as inuring to it under the school-land grant.

In sustaining a motion to dismiss, one of the grounds of which was that the suit was in effect one against the United States, the court said (p. 58):

> The motion should be granted on the ground that the suit is one against the United States, under the authority of *Louisiana* v. *Garfield*, 211 U. S. 70. In that case a bill was brought in this court to establish the title of the State of Louisiana to certain swamp lands which it claimed under the statutes of the United States and to enjoin the Secretary of the Interior and other officers of the Land Department from carrying out an order making different disposition of the land.
>
> Under the statute it was contended the land vested in the State in fee simple, that is, the act was contended to have the same character and efficacy as the Act of June 21, 1898, is asserted to have in the case at bar. And certain facts were necessary to be determined

as elements of decision. This court said that in the case there were questions of law and of fact upon which the United States would have to be heard. So in the present case there is a question of law whether the Act of June 21, 1898, had the quality as a grant of the land asserted of it, whether of itself or because of its terms or their prior construction and its adoption, indeed, whether there was such a prior construction or its adoption, and again of the fact of the character of the land at the time of the grant and the evidence of it and the knowledge of it.

CONCLUSION.

As the Company had neither legal nor equitable title to the lands here involved, as the withdrawal cut off whatever inchoate rights had been initiated by the filing of the selection list and as the suit was in effect one against the United States, it follows that the decree of the Court of Appeals, should be reversed, and the decree of the Supreme Court of the District of Columbia should be affirmed.

Respectfully submitted.

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